

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Part 22 of the Commission's	)	WT Docket No. 03-103
Rules to Benefit the Consumers of Air-Ground	)	
Telecommunications Services	)	
	)	
Biennial Regulatory Review—Amendment of	)	
Parts 1, 22, and 90 of the Commission's Rules	)	
	)	
Amendment of Parts 1 and 22 of the	)	WT Docket No. 05-42
Commission's Rules to Adopt Competitive	)	
Bidding Rules for Commercial and General	)	
Aviation Air-Ground Radiotelephone Service	)	
	)	
Application of Verizon Airfone Inc. for	)	File No. 001716212
Renewal of 800 MHz Air-Ground	)	
Radiotelephone License, Call Sign KNKG804	)	

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**OPPOSITION OF VERIZON AIRFONE TO PETITION FOR PARTIAL  
RECONSIDERATION OF AIRCELL, INC.**

The Commission should reject AirCell's requests to shorten the transition period for relocating Airfone's air-to-ground ("ATG") operations and to further reduce the already shortened license renewal term granted to Airfone. AirCell's Petition ignores the fact that, for over fourteen years, Airfone has met and continues to meet its obligations as a licensee to serve the public. Under the Communications Act and long-standing Commission precedent, therefore, Airfone was entitled to a full license renewal expectancy and fair treatment of its existing operations. The record in this proceeding and Commission precedent demonstrate that Airfone was entitled to a full ten-year license renewal and at least the two-year transition period ordered by the Commission. There is no basis for reducing them further.

In the *Order*, the Commission granted Airfone a five-year, non-renewable license for its ATG service and provided Airfone with a two-year transition period during which to relocate its current use of 4 MHz of ATG spectrum to a single, 1 MHz block.<sup>1</sup> AirCell now claims that the Commission should reduce the transition period to six months and the license term to two years.

In fact, however, the decision to terminate Airfone's license after five years and to provide a limited relocation period without compensation for relocation costs is unsupported by the record, and Airfone was entitled to more time to transition and offer its service to the public. Against this backdrop, it is apparent that AirCell's request to further reduce the transition period and the license renewal term should be summarily rejected.

**I. THE COMMISSION'S RULES AND PRECEDENTS ESTABLISH THAT AIRFONE WAS ENTITLED TO A FULL RENEWAL**

Section 22.940(a) of the Commission's rules provides that the "most important factor" to be considered in a renewal proceeding is the renewal expectancy of the current licensee.<sup>2</sup> A renewal applicant is entitled to a renewal expectancy if it can establish that it provided "'substantial' service" and "substantially complied with applicable FCC rules, policies and the Communications Act of 1934, as amended."<sup>3</sup> This renewal expectancy has been extended to all CMRS licensees, including ATG licensees.<sup>4</sup>

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<sup>1</sup> *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services*, WT Docket No. 03-103, Report and Order, FCC 04-287 (rel. Feb. 22, 2005) ("*Order*").

<sup>2</sup> See 47 C.F.R. § 22.940(a).

<sup>3</sup> *Id.* § 22.940(a)(1).

<sup>4</sup> See *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool*, 9 FCC Rcd 7988, ¶ 385-386 (establishing renewal expectancy for all CMRS licensees); see also 47 C.F.R. § 20.9(a)(8) (including ATG within the definition of commercial mobile radio service). If an applicant is entitled to a renewal expectancy, the Commission is to grant the

The record in this proceeding demonstrates that Airfone has met these criteria for a renewal expectancy. Airfone has continued to provide substantial service to customers while every other ATG licensee has suspended service, and Airfone has complied with applicable rules and statutes. Nevertheless, without discussing Airfone's renewal expectancy or providing any rationale, the Commission granted a license five years shorter than the license term to which Airfone had earned a renewal expectancy.

The *Order* contains at least one significant factual error which led to a number of unsupported conclusions regarding Airfone's service. In the background section of the *Order*, the Commission states that "American Airlines...has suspended Verizon Airfone service due to a sharp decline in passenger demand."<sup>5</sup> This is a mistake. American Airlines did suspend passenger voice services in 2002.<sup>6</sup> However, American Airlines' service provider was AT&T/Claircom ("Claircom"), *not* Airfone.<sup>7</sup> No airline has unilaterally discontinued Airfone service.

The *Order* concludes, based in part on this mistake, that Airfone's system is "approaching technological obsolescence."<sup>8</sup> But the record does not support this conclusion and provides no basis for reducing Airfone's renewal term to five years. Even today, ten to twelve

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renewal without regard to competing applications. From a policy standpoint, it makes no sense to ignore the prospect of a renewal expectancy for Airfone and to shorten the term of the renewal from ten to five years. It would be far less rational, however, to adopt the further truncation of the license term as requested by AirCell.

<sup>5</sup> *Order* ¶ 23.

<sup>6</sup> See Comments of American Airlines, WT Docket No. 03-103 (filed August 30, 2004).

<sup>7</sup> See "American Airlines to use McCaw Cellular's Clarion AirOne system," Press Release, at <http://www.att.com/news/0694/940601.pca.html>; see also "Airline grounds in-flight phone service," Sam Ames, CNET News.com at <http://news.com.com/2100-1033-831093.html>. Among other things, Claircom's service was markedly more expensive than Airfone's. Whereas Airfone was (and is) charging \$3.99 to connect and \$3.99 per minute, Claircom was charging \$2.99 to connect and \$7.60 per minute, almost double Airfone's per minute charge.

<sup>8</sup> *Order* at ¶ 78.

general aviation aircraft per month are equipped with Airfone's Magnastar product.

To the contrary, the record shows that Airfone has continued to invest in its system to provide new data services, including e-mail and instant messaging.<sup>9</sup> Though these efforts are acknowledged in the *Order*, they are disregarded completely in its conclusions.<sup>10</sup> As a result, the record does not support AirCell's claim that Airfone's system is "obsolescent."<sup>11</sup>

## **II. THERE IS NO BASIS FOR REDUCING THE RELOCATION TRANSITION PERIOD AFFORDED TO AIRFONE IN THE ORDER**

AirCell argues that "the *Order* is vulnerable to a challenge under the Administrative Procedures Act ("APA"), given that the *Order* adopts a decision (the two-year transition) that is antithetical to the findings in the *Order*, and cites to nothing in the record to support such a long transition."<sup>12</sup> AirCell's Petition provides no basis for reducing the relocation transition period that was granted to Airfone. Moreover, AirCell's claim that a six-month period would be sufficient to relocate Airfone's service is inaccurate and demonstrates AirCell's own lack of understanding about the realities of the ATG business.

AirCell first argues that the two-year transition period is excessive because AirCell itself will likely be "ready and able" to provide ATG broadband service within a few months of the proposed ATG auction, and that any further delay will "lower[] the potential value of an ATG license from AirCell's perspective."<sup>13</sup> Even if this were true, AirCell's business decision to engage in pre-auction, pre-grant construction and testing in order to obtain a running head-start on its competitors provides no basis for disturbing the Commission's judgment, especially given

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<sup>9</sup> See Verizon Airfone Comments in WT Docket No. 03-103, 12 (filed Sept. 23, 2003).

<sup>10</sup> *Order* at ¶ 23.

<sup>11</sup> Petition at 6, 10.

<sup>12</sup> *Id.* at 4-5.

<sup>13</sup> *Id.* at 3.

the fact that AirCell is in no way guaranteed to be a winning bidder at auction.

Next, AirCell argues that the Commission's decision to provide Airfone with a two-year transitional period acts as a "perverse 'bidding credit'" for Airfone, since Airfone will be "bidding on a 10-year license, while other auction participants will, in effect, be bidding on an 8-year license."<sup>14</sup> This argument itself is somewhat perverse given that the decision to provide Airfone with this transitional period was done in the context of an order that essentially terminates Airfone's established ATG business without any compensation for its lost spectrum or relocation costs. Airfone, just like any other bidder, will be subject to the need to transition the narrowband service to the 1 MHz of spectrum if it wins the auction.

AirCell claims, without support, that Airfone's transition from 4 MHz of shared spectrum to 1 MHz of the ATG band would not "require a significant expenditure of time or resources," and could be completed in six months.<sup>15</sup> AirCell is fundamentally mistaken, and its claim demonstrates that AirCell misunderstands the realities of the ATG business it hopes to enter. For example, AirCell assumes that Airfone's ground stations can be remotely retuned to the new spectrum.<sup>16</sup> AirCell is incorrect. In order to retune the operating frequencies, the software controlling the ground station must be modified, evaluated, tested and deployed during an on-site visit. Additionally, each location needs to be evaluated for the installation of customized emission filters. These filters need to be manufactured to the specific subband in which the ground station will operate. But that band will not even be known until the conclusion of the auction. This is so because the *Order* provides that under two of the three band plan options the 1 MHz of narrowband spectrum will be assigned at one end of the band or the other, i.e., band

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<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 5-6.

<sup>16</sup> *Id.* at 5.

plan “2” or “3.” But that assignment will not occur until after the auction. Thus, while some planning can begin immediately, much of the effort must await the completion of the auction.

Additionally, frequency changes along the border for ground stations operating in Mexico and Canada need to be coordinated with any frequency changes in the U.S. Customers flying on aircraft near border cities regularly utilize ground stations in both Canada and Mexico. ATG traffic in and around San Diego, Houston and the Northeast will be adversely affected if frequency changes are mandated in the United States ahead of frequency changes to ground stations in Mexico and Canada.

AirCell’s contention that “the consolidation of Airfone’s current service into a smaller spectrum block will not be complicated by the need to transition a large number of users,” is also incorrect.<sup>17</sup> Today, the Airfone service is installed on over 4,800 aircraft. Over 3,000 of these aircraft include general aviation, military, and federal government aircraft that operate Magnastar-branded equipment. Unlike commercial aircraft, these aircraft cannot be remotely contacted for reprogramming and, therefore, require a maintenance visit. Furthermore, since equipment of this type is sold to the aircraft owner, Airfone has no control over when this visit will take place. Additionally, as with the ground stations, the radio tuning software needs to be rewritten and tested prior to release to the customer’s third-party maintenance provider. Arbitrarily compressing the transition period to six months would, in effect, force Magnastar customers to migrate prematurely from the existing Airfone narrowband service. This forced migration prior to the full-scale deployment of the ensuing broadband service would result in a windfall opportunity to other competing narrowband service providers such as AirCell.

As the record shows, Airfone requires at least 1 MHz of spectrum to continue to provide

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<sup>17</sup> *Id.* at 6.

its existing services. In the past, the Commission has tried to provide incumbents with comparable capacity and spectrum when relocating their operations. *See Emerging Technologies*<sup>18</sup> and SMR proceedings.<sup>19</sup> The Commission has focused especially on providing a “seamless transition” for incumbents transitioning from their old frequencies to their relocated frequencies.<sup>20</sup> Airfone expects that the two-year transition period will provide it sufficient time to undertake the steps needed to make the transition to 1 MHz of spectrum and to deal with technical constraints that may be caused by the transition. The Commission should not depart from this precedent here, and should affirm its grant of a two-year transition period in order to provide Airfone sufficient time to undertake a seamless transition.

AirCell claims that “the most analogous precedent to the instant situation”<sup>21</sup> is the Commission’s recent decision to re-designate a 5 MHz portion of mobile satellite service spectrum used by Globalstar to terrestrial Broadband Radio Service (“BRS”) providers.<sup>22</sup> AirCell is wrong. Globalstar was not “relocated,” but instead will continue to share spectrum with terrestrial providers under the new plan, albeit on a secondary, non-interference basis. The Commission’s decision to authorize BRS on this spectrum, therefore, did not require any modification to Globalstar’s satellite system or the terrestrial handsets used by its customers. In this case, however, the *Order* requires both that Airfone give up 3 MHz of spectrum in which it

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<sup>18</sup> *Emerging Technologies Third Report and Order* ¶ 36 (new entrants were required to provide incumbents with “comparable facilities,” which were to be “equal to or superior to existing facilities” considering, *inter alia*, “capability, speed, bandwidth, [and] throughput”).

<sup>19</sup> *See Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, Second Report and Order, 12 FCC Rcd 19079, ¶ 92 (new entrants were required to provide incumbents with the “same number of channels with the same bandwidth that is currently available to the end user”).

<sup>20</sup> *Future Development of SMR Systems Order* ¶ 79.

<sup>21</sup> Petition at 7.

<sup>22</sup> *See Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems*, Report and Order, Fourth Report and Order, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 13356 (2004).

is currently entitled to operate and that Airfone reprogram all of its mobile and ground stations to operate only within the 1 MHz of spectrum licensed to it post-auction. In addition, Airfone will need to evaluate each ground station for the possible addition of new filters. Airfone is currently utilizing the entire 4 MHz of ATG spectrum for its operations, necessitating significant time for the relocation of its operations to 1 MHz. The Globalstar decision provides no basis for shortening the transition period.

**III. THERE IS NO BASIS FOR SHORTENING THE ALREADY SHORT TERM RENEWAL AFFORDED TO AIRFONE**

AirCell's request that the Commission reduce the five-year license granted to Airfone by the *Order* should also be rejected. AirCell again ignores the fact that Airfone is the only ATG licensee currently providing service to the public and, as such, deserves both deference and a renewal of its license that recognizes this continued service to the public. Furthermore, AirCell's focus on hypothetical complications that could be caused by Airfone's five-year, post-auction license are misguided. These arguments ignore the fundamental equitable issues inherent in terminating Airfone's license to accommodate new entrants into the ATG band.

As noted above, Airfone was entitled to a full ten-year renewal based on its substantial service and compliance with the Commission's rules. Assuming that the Commission's decision to provide only this shortened renewal was lawful, however, a five-year license at least recognizes that Airfone has a customer base (including government users) that will rely on Airfone's continued service until a new, equally reliable ATG provider can begin service. The five-year term also recognizes that Airfone has contractual commitments to its airline partners to continue providing service.

AirCell argues that the five-year renewal term granted to Airfone could, under completely hypothetical circumstances, result in some inconvenience to new entrants in the ATG



band, including delaying the rollout of a new entrant's service and requiring new entrants under one band plan to fully overlap their services, rather than 2/3rds overlap, during Airfone's five-year license term.<sup>23</sup> Ironically, AirCell argued during this proceeding that such an overlap scheme was quite feasible.<sup>24</sup> In any event, AirCell's claim that Airfone's continued service will harm new entrants turns Commission precedent on its head. In the past, when the Commission has displaced an incumbent licensee to make way for new licensees at auction, the focus has been on the inconvenience imposed upon the incumbent, not on the inconvenience to new entrants who are already being accommodated at the expense of the incumbent. In the case here, the Commission is not only displacing Airfone from its current spectrum home without compensation, it is also terminating Airfone's license altogether after five years, effectively legislating the useful life of Airfone's ATG equipment. Any inconvenience borne by new entrants from Airfone's continued service should be viewed as a minor condition on the significant spectrum resources that Airfone is surrendering for new entrants to bid on at the auction.

#### **IV. CONCLUSION**

AirCell's petition for reconsideration ignores the fact that Airfone is the sole, current ATG licensee offering service, and has invested significant resources to meet its responsibilities to the Commission and the public for 14 years. As Airfone has demonstrated, Commission precedent entitles it to a full license renewal and cost compensation for its relocation, neither of which are provided by the *Order*. As a result, AirCell's requests to shorten the transition period and Airfone's five-year license should be rejected.

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<sup>23</sup> Petition at 9-10.

<sup>24</sup> See Letter from Michelle C. Farquhar, Hogan & Hartson, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated Oct. 21, 2004, transmitting "Deployment of two Cross Polarized Systems in the ATG Band."

Respectfully submitted,

Verizon Airfone Inc.

By: /s/ Leslie V. Owsley

(via electronic filing)

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June 16, 2005

### Certificate of Service

The undersigned certifies that a copy of the foregoing Opposition of Verizon Airfone to Petition for Partial Reconsideration of AirCell, Inc., was served this 16<sup>th</sup> day of June 2005 by United States Mail, first class postage prepaid, on the following:

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